APPEAL NO. 92447

On July 20, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The employer/respondent, (employer), had disputed compensability of the injury after the insurance carrier admitted liability and began payment of benefits. The hearing officer determined that the claimant, (claimant), appellant, did not sustain an injury to her back on (date of injury), in the course and scope of her employment as a nursing assistant with the employer/ respondent, although she had sustained an injury to her toe.

Appellant asks for reconsideration by the Appeals Panel. Appellant argues that the evidence supports that her back was hurt on the date in question. Appellant also complains that she had been notified that the contested case hearing was to be held August 7, 1992, but that it was changed to July 20, 1992. Appellant argues that she received the employer/respondent's evidence first thing that morning and had no time to prepare. Employer/respondent argues that the evidence supports the hearing officer's decision, and that appellant has waived any error that may have occurred because of the setting of the hearing or failure to exchange documents.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The appellant testified that she worked as needed when called to duty at employer as a nurse's assistant. This required taking of vital signs from patients, carrying meal trays to them, lifting and moving patients when necessary, and performing requested support tasks when asked to do so. Appellant testified that at approximately 11:00 a.m. on (date of injury), as she went to take a patient's blood pressure, her foot caught on the base of a bedside table which was parallel to the patient's bed. This caused the table to tilt toward the patient. Appellant testified that she twisted in order to grab the table and things on it, to prevent them from falling on the patient.

Appellant hurt her foot and toe; she filed an incident report that day with the employer. She stated that her back also hurt but she attributed this to limping as a result of the foot injury. Her incident report claims an injury to the foot and does not describe any twisting. The next day, she went to see (Dr. H), her family physician. His notes from that date indicate that appellant hurt her foot. A notation is also made that appellant twisted her back. Treatment was rendered to her foot. Appellant stated that on June 17, 1991, she suffered severe back pain. She stated that she eventually became aware, through a process of elimination, that it was the twisting that occurred on (date of injury) that injured her back, because the pain was in the same area. She described the pain as under her rib cage, going around to her back. She stated that her first manifestation was in her breast, however, so that she was asked to have a mammogram to rule out problems in this area. Appellant stated that she attempted to take workers' compensation leave related to her back but her employer told her she could not file this as workers' compensation. Appellant stated she had not worked since June 17, 1991.

Medical records indicate that appellant was treated by Dr. H for back pain and spasms going around the rib case in February 1991. Dr. H also treated appellant for mid-back pain on May 20, May 22, (when thoracic/lumbar strain was diagnosed) and May 30, 1991 (when his notes state "still real sore"). The (date) notes indicate that she twisted her back. Notes from a June 11th appointment only note a cyst in her breast. On June 19, 1991, appellant was seen again and Dr. H states that she has pain all across her back which began two days ago. The appellant testified that if this was what the notes said, than this is what she probably told Dr. H at the time. His diagnosis is thoracic strain and spasm.

X-rays of her thoracic spine taken (date) indicate "no fractures;" on August 1991, a "normal" x-ray is shown to indicate mild chronic "DJD"; on September 24, 1991, a normal cervical spine x-ray was taken. On September 27, 1991, a CAT scan of the spine indicated "no significant disc bulging" but the notes also stated that a small disc herniation, if present, could not be detected. A magnetic resonance imaging (MRI) exam taken October 8, 1991 of the thoracic spine notes a history of chronic degenerative changes. Degenerative disc desiccation is found in some vertebrae of the thoracic spine. The report for the MRI also notes the absence of any "frank disc herniations" or spinal canal stenosis. On November 21, 1991, Dr. H signed a disability claim with an insurance company other than the carrier here which stated that there is a herniated disc at each of the locations listed in the MRI as "degenerative disc." In July 1992, Dr. H completed the proper Texas Workers' Compensation form certifying that appellant had reached maximum medical improvement, and assigned a 2% whole body impairment rating.

The respondent/employer filed affidavits as follows: The billing clerk for Dr. H, (J O), stated that all bills were paid through appellant's HMO (Health Maintenance Organization) until September 1991, when she told appellant that the HMO would no longer pay. She stated that, at that point, the appellant informed her that the back injury was related to an on-the-job incident which occurred (date of injury). An affidavit from Dr. H also states that it was not until September 1991 that he was informed that she thought her back pain related to the (date of injury) incident. (Dr. J), to whom appellant was referred by Dr. H, states that he diagnosed appellant to be suffering from generalized osteoporosis, and that she never indicated that this was a workers' compensation injury. Similar affidavits are presented from supervisory persons at employer denying that she initially claimed she hurt her back in the (date of injury) incident. A medical leave form filed by the appellant for time off beginning June 17, 1991 claims "I am unable to lift at this time because of pain in shoulders, numbness of hands and feet." Appellant stated that this was completed after the form she originally filled out, claiming workers' compensation, was torn up by the administrative assistant for the Director of Nurses, (P E), who said that the employer couldn't have workers' compensation checked on that form. She stated that she billed Dr. H's services to the HMO because that is what she and Dr. H decided.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error

based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). A claimant must link any contended physical injury to an event arising from his employment. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-1961, no writ). Any conflict among medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.- Corpus Christi 1973, no writ).

There is evidence both supporting and refuting that the injury sustained by the appellant on (date of injury) extended to her back. Clearly, appellant was treated only days before the incident for thoracic back problems. Although Dr. H notes on (date) that appellant twisted, his affidavit indicates that it was not until sometime in September 1991 that he was told that the back may have been hurt on-the-job. Appellant herself testified that she identified her back pain with this incident only through the process of elimination, and she was not sure, when asked, exactly when she formed such an opinion. With the greatest respect to appellant, the hearing officer could well have determined that appellant continued to suffer from back problems encountered before (date of injury), which are primarily degenerative and chronic, and that she is only retrospectively attributing increased pain to the episode where she injured her foot.

At the beginning of the hearing, appellant mentioned that the date had been changed. When the hearing officer, noting she did not have an attorney, asked if she needed more time, appellant chose to go forward with the hearing. Concerning the employer/respondent's evidence, the appellant did not object at the hearing that it was not timely exchanged, and as no prejudice to her preparation of her case has been demonstrated, this point of appeal is overruled.

There being sufficient evidence to support the decision of the hearing officer, we affirm her decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Joe Sebesta
Appeals Judge